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IN THE

Supreme Court of the United States

October Term, 1962

JAMES LaFAZIA, CHARLES GERSH and DAVID BRILL,

Petitioners,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now come James LaFazia, Charles Gersh and David Brill, by their attorneys, Joseph Brill and Jacob W. Friedman, and pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the judgment of the United States District Court for the Eastern District of New York, which Court imposed a prison sentence on each of the petitioners.

A codefendant, one Harold Wapnick, tried simultaneously with these petitioners, is filing an independent petition for a writ of certiorari, and the present petition is based upon the record which he has caused to be certified.

Opinion Below

The Court of Appeals rendered the following memorandum opinion:

> "PER CURIAM:
>
> "The evidence here was quite sufficient and the case was fairly tried and properly presented to the jury. Hence we find no reversible error. Defendant Wapnick's contention of double jeopardy is *prima facie* untenable in the light of *United States* v. *Lanza*, 260 U. S. 377, and *Abbate* v. *United States*, 359 U. S. 187.
>
> "Affirmed."

Jurisdiction

The judgment of the Court of Appeals was entered on March 27, 1963. On April 26, 1963, Mr. Justice Harlan signed an order extending petitioners' time to file for certiorari to and including May 6, 1963.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254; 18 U. S. C. 2(a); 21 U. S. C. 173, 174; 18 U. S. C. 371; 26 U. S. C. 2553(a); 26 U. S. C. 2554(a); and Rule 17c of the Federal Rules of Criminal Procedure.

Statutes Involved

Petitioners were convicted of transporting stolen motor vehicles in interstate commerce, and of conspiracy, in violation of 18 U. S. C. 2312, 371, 2.

Statement of Proceedings

Trial was had before Bartels, D. J., and a jury, and consumed eight weeks, terminating December 7, 1961. The record consists of more than 3,500 pages and many exhibits. Besides petitioners and Wapnick, ten other defendants were named in the lengthy indictment. The case against one was dismissed; two obtained severances; and seven pleaded guilty before trial.

Petitioners were convicted on various counts and sentenced as follows: LaFazia nine months; Gersh three and one-half years; and Brill six months. They were continued on bail during the pendency of appellate proceedings.

Questions Presented

The several questions raised are indicated in the captions of the argument's subdivisions below.

Reasons for Granting Writ

The argument has consistently been made by petitioners below, and they reiterate it in this Court, that they are innocent, having had no knowing connection with or participation in the offenses charged. They recognize that this is not the forum for the presentation of questions of fact. However, they contend that the facts necessary to sustain a conviction are absent, so much so as to render improper the submission to the jury of the issues as to them. In any event their innocence is certainly not a factor which should detract from the validity of the arguments they advance in any appellate tribunal.

Quite apart from the foregoing, the case involves a number of questions upon which the determination reached is in apparent conflict with established law. The rulings of the trial Court, heretofore sustained herein, constitute prejudicial and reversible error. In at least one instance, the ruling of the Court of Appeals is at variance with the holdings of other Federal Courts of Appeals on the same subject. This diversity of opinion in different circuits relates to important questions of Federal law which should be settled by this Court.

In view of the requirements of the rules that the questions presented for review be expressed without unnecessary detail, an attempt will be made to set forth these matters as concisely as is consistent with the necessities of the case.

ARGUMENT

QUESTION No. 1

Whether the record presents any evidence that these petitioners were guilty of the crimes charged and whether the trial Court erred in denying their respective motions to dismiss. In this connection, whether the Second Circuit rule as to the sufficiency of the evidence to send a case to the jury in a criminal prosecution is the same as in a civil action, and whether this is a proper rule although admittedly in conflict with the law as announced in other Federal Circuits.

Each of the petitioners contended below that the Government had failed to sustain the burden of proving either the substantive crimes or conspiracy; that the evidence established their honesty and good faith; and that the case with respect to them should not have been sub-

mitted to the jury. Particularly in a case in which so many defendants were named, and in a two-month trial, it was obviously a matter of some difficulty to keep the identities of individuals in mind and to differentiate among them. The course of least resistance would be the assumption that if a person had been mentioned often enough, he must have been party to a crime or crimes. The constant confusion is manifest even in the record, with both trial Court and counsel repeatedly being unable to correlate the evidence.

In *United States* v. *Falcone* (C. C. A. 2, 1940), 109 F. 2d 578, the convictions of five of eight defendants in a conspiracy case were reversed, Learned Hand, Cir. J., writing:

> "It is not enough that he does not forgo a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided."

This Court unanimously upheld this reversal (311 U. S. 205), Mr. Justice Stone pointing out that knowledge of the conspiracy could not be inferred "from the casual and explained meetings of respondents with others who were convicted as conspirators."

It has consistently been the position of the Government in the Second Circuit that the standard of evidence requisite to send a case to the jury is the same in both civil and criminal cases, in view of the Second Circuit holdings in *United States* v. *Masiello*, 235 F. 2d 279, and *United States* v. *Castro*, 228 F. 2d 807. In the latter case, however, the late Circuit Judge Frank stated that different views were apparently entertained in other circuits, including the Third, Fifth, Eighth, Ninth, Tenth and the District of Columbia. E.g., see *Vick* v. *United States* 216 F. 2d 228. Thus it may fairly be said that in a majority of the circuits a view of the law contrary to that of the Second Circuit is taken. Such a divergence presents a classic case for the exercise of the jurisdiction of the Supreme Court of the United States. The vast number of criminal prosecutions, as attested by the volume of reported cases, as well as official records, eminently requires that the liberty of an individual should not be dependent upon the circuit wherein he is tried. The confused state of the law on the subject calls for authoritative resolution.

QUESTION NO. 2

Whether in reading to the jury the substantive counts of the indictment the trial Court erred in omitting the names of the defendants not on trial.

The trial Court buttressed its instructions by reading to the jury the substantive counts of the indictment (Dec. 6, pp. A-10-21). In so doing, however, the Court omitted the names of ten additional defendants who were not on trial, to which omission exception was duly taken (id., pp. 184-185). To be sure, the whole practice of reading an indictment to the jury is one which the courts "do not

in general commend * * * nor consider it as contributing much to the clarification of factual issues to be decided." *Norman* v. *United States* (C. C. A. 6, 1939), 100 F. 2d 905. Surely, when a trial judge does elect to read the indictment to the jury, the several defendants actually being tried are entitled to have the instructions include the rather fundamental information that ten other persons have been designated defendants in the same indictment by the same grand jury, and that the Government's theory embraces a total of sixteen individuals as alleged participants in the crimes charged. A patent result of neglecting to include the names of the others was to give the trial jury a distorted picture of the various accusations, with the likely effect of magnifying any possible complicity of the defendants actually on trial.

QUESTION NO. 3

Whether the trial Court erred in instructing that the Government did not have to prove defendants' knowledge that stolen cars were being transported in interstate commerce.

Regarding the substantive counts the trial Court charged that knowledge of transportation in interstate commerce was not required, to which exception was taken (Dec. 6, pp. A-36-A-189). Although in a mere conspiracy case knowledge of the interstate character of the transaction is deemed requisite—see *United States* v. *Crimmins* (C. C. A. 2, 1941), 123 F. 2d 271, and *United States* v. *Sherman* (C. C. A. 2, 1948), 171 F. 2d 619—, we submit that the same rule must be held applicable to the substantive offense. The driving must be "done as a substantial step in furtherance of the intended interstate journey." See *Barfield* v. *United States* (C. A. 5, 1956), 229 F. 2d 936.

The case must not be confused with one involving receiving (18 U. S. C. 2313), wherein knowledge of the interstate character of the transportation has been held immaterial (cases cited in 56 A. L. R. 2d 1330).

QUESTION NO. 4

Whether the reception of testimony as to the valuable contents of an automobile alleged to have been stolen did not constitute inadmissible and prejudicial evidence of the commission of another crime.

The Government was permitted to prove, over objection, the valuable contents of a vehicle claimed to have been stolen (Oct. 16, pp. A-3-8). Accordingly there was placed before the jury an imputation of the theft of other property having no bearing upon the crimes charged in the indictment. This evidence was not so closely connected as to constitute it one of the recognized exceptions to the rule forbidding proof of other crimes, and its reception was such as to cause a conviction on charges other than those for which petitioners were on trial. See *Shea* v. *United States* (C. C. A. 6, 1916), 236 F. 97, and *Boyer* v. *United States* (C. A., D. of C., 1942), 132 F. 2d 12.

QUESTION NO. 5

Whether the trial Court erred in receiving hearsay evidence as to the alleged payment of money to one of the petitioners.

Concerning petitioner Gersh, the trial Court permitted hearsay testimony as to the alleged payment of money to him (Oct. 25, p. 481). His counsel promptly requested an

instruction to the jury that this proof was not binding on Gersh, but he was overruled (id., pp. 481-484). Belief by the jury that he was the recipient of $4,600 in this connection may well have influenced a determination of his complicity. The testimony was that of the Government's chief witness (Philippe Roy), and even he was somewhat vague about the matter, saying, "As far as I know, this possibly would happen." The vice of the hearsay was compounded by its character as a mere possibility or conjecture. Proof of such remote kind is not to be received as an element of the requirement that guilt be shown beyond a reasonable doubt. Judicial disapproval of hearsay is of such commonplace occurrence as scarcely to require the citation of authority. See *Hopt* v. *Utah*, (1884), 110 U. S. 574.

QUESTION NO. 6

Whether it was error to receive material testimony as to an alleged telephone conversation with one of the petitioners when the witness neither knew him nor could identify his voice.

One of the prosecution's important witnesses, who did not know petitioner Gersh at all, was allowed, over objection (Nov. 15, pp. 2-4, 120), to testify to a number of supposed telephone conversations with him the effect of which was to suggest consciousness of guilt. The Government pressed to have this proof received, and may not fairly be heard to urge that it was inconsequential or to minimize its importance. Of course, the law is clear that in the absence of proof of the identity of the speaker, testimony as to a telephone conversation with him is not competent, since "the witness must recognize the declar

ant's voice." L. Hand, Circ. J., in *United States* v. *Frankel* (C. C. A. 2, 1933), 65 F. 2d 283. Some identification is necessary. Underhill's Criminal Evidence, 5th ed., Sec. 129; *Lewis* v. *United States* (C. C. A. 6, 1926), 11 F. 2d 745.

QUESTION NO. 7

Whether the trial Court's summary of the evidence in its instructions was not unfair to petitioners.

A substantial portion of the lengthy charge to the jury (Dec. 6, pp. A-2-184) was devoted to a discussion of the evidence. It is not practical to include herein the multifarious details, but the recital was virtually an outline of the Government's case. Counsel for two of the petitioners felt constrained to "take specific exception to resumé of all the facts as they pertained to the defendants Brill and LaFazia" and likewise to the Court's omission to refer to the additional testimony elicited on cross-examination (id., p. A-190). Counsel for a codefendant excepted to the charge because "it appeared not to be a summary as much as your interpretation of the facts" (id. p. A-213).

The law is well established that "an instruction is erroneous which singles out or emphasizes particular testimony or particular parts of the evidence and gives undue prominence thereto." 23A C. J. S. 748. The judge's comment must not "cross the border line of fairness." Simkins' Federal Practice, rev. ed., Sec. 173. See *Leslie* v. *United States*, 43 F. 2d 288. It is imperative where the evidence is reviewed in the charge that it be stated not only accurately, but also "with fairness and impartiality to both sides." Abbott's Criminal Trial

Practice, 4th ed., Sec. 670. Failure to adhere to these principles should vitiate any verdict as having been rendered in violation of the requirement of a fair trial, and especially where, as herein, the case against petitioners was of so slight, flimsy or conjectural character.

QUESTION NO. 8

Whether the purported compliance with the jury's request for redefinition of conspiracy was irresponsive, confusing and prejudicial.

On the second day of deliberations the jury asked for the definition of conspiracy (Dec. 7, p. A-247), requesting explicitly "the short portion" of the charge containing the answer. Nevertheless, the judge insisted upon having read to the jury seven full pages of the charge (id. p. A-249; Dec. 6, pp. A-68-A-74), including divers aspects of the conspiracy concept inimical to defendants, such as the separability of the conspiracy charge, the absence of any requirement that the unlawful object be accomplished, the adequacy of a single overt act, the immateriality of absence of formal agreement, the sufficiency of implied understanding deducible from acts pursuant to apparent criminal purpose, unimportance of fact that a party did not even know the identity of other conspirators, the sufficiency of circumstantial evidence to show guilty knowledge and a reiteration of the supposed rule as to substantive counts that the prosecution did not have to prove actual knowledge of defendants as to interstate transportation. This was concluded with a discussion of "foreseeability" (Dec. 7, p. A-74) which was so obscure as to be quite unintelligible. As a result the instructions were clearly violative of the principles expressed in *Bollenbach v. United States*, 326 U. S. 607, 612.

QUESTION NO. 9

Whether the rights of petitioners were violated by numerous irregularities, especially affecting petitioner Brill.

Various other incidents occurring in the course of the proceedings seriously militated against their fairness. Thus, when the jury requested the rereading of certain testimony, no reporter was present at the time, nor did the Court give the explanation requested by the jury. Secondly, in the midst of the trial the brother of petitioner Brill died, with the result that Brill had to absent himself for three days; the Court refused to halt the proceedings; the trial proceeded in Brill's absence; and damaging testimony was introduced in the interim. Thirdly, Brill's request for a change of lawyers after his return was denied although admittedly counsel representing him could not properly do so by reason of a conflict of interest (the same counsel representing petitioner LaFazia—to whom the ruling was equally unfair). Fourthly, the Court provoked one of the attorneys into a bitter discussion in the presence of the jury, and the effect was necessarily harmful. Fifthly, it developed during the trial that some of the jurors had worked in the court house-building (in the Post Office) for many years, and knew that the postal superintendent, their superior, was a witness in the case; one of these jurors, a postal clerk, occupying seat 5 or 6, later blossomed out as foreman of the jury (although one of the jurors stated in open court that this was without her consent or even her knowledge); and petitioner Brill's protest in this connection was unavailing. Sixthly, a number of motions made by petitioner Brill were never passed on by the trial Court, to wit, to dismiss the indictment or certain counts thereof; and to

declare a search of his premises without a search warrant illegal, although the proof clearly established the merit of his position in this regard. Finally, Government witnesses were permitted to confer with the prosecutor during the course of their testifying, although the Court had ruled that such procedure would not be permitted.

QUESTION NO. 10

Whether the argument of collateral estoppel and double jeopardy, urged by defendant Wapnick, is valid and inures to the benefit of these petitioners.

If the prosecution of Wapnick, by reason of prior proceedings, could not be maintained (as argued by him in his companion petition), it would follow that such a conclusion would have forceful impact upon any attempted trial of petitioners. Any conclusion by the Court in his favor would at the very least necessitate a retrial of petitioners, if not a dismissal of the case as to them.

QUESTION NO. 11

Whether the cumulative effect of the errors urged operated to deprive petitioners of a fair trial.

The best that can be said for the Government's position as to these petitioners is that the proof against them was certainly not of a clear or conclusive character. The least weight ascribable to this feature of the case is that they were entitled to a trial free from prejudicial error, so that incorrect rulings which might otherwise be disregarded must be given greater force in their possible bearing upon the outcome.

The cumulative effect of as few as two errors may necessitate the reversal of a conviction. See *Gordon* v. *United States*, 344 U. S. 414. Especially where the case is "a close one" and not "open and shut," an error otherwise harmless will be viewed as prejudicial. *Bihn* v. *United States*, 328 U. S. 633; *United States* v. *Tomaiolo*, 249 F. 2d 683.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners.